Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Petition for Forbearance of	)	WCB Docket No. 05-170
XO Communications Inc., *et al.*	)	
	)	
	)	

COMMENTS OF COMPTEL

CompTel, by its attorney, hereby respectfully submits its comments in the above-referenced docket. On March 28, 2005, XO Communications, Inc., Birch Telecom, Inc., BridgeCom International, Inc., Broadview Networks, Eschelon Telecom, Inc., NuVox, Communications Inc., SNiP LiNK LLC, and Xspedius Communications, Inc. (hereinafter the CLEC Coalition) filed a petition for forbearance pursuant to section 10(c)[1] of the Communications Act, as amended. The CLEC coalition seeks forbearance from three discrete aspects of the Commission's Triennial Review Remand Order (TRRO).[2] CompTel urges the Commission to grant the relief requested by the CLEC Coalition.

At the outset, CompTel notes that it has appealed aspects of the TRRO, including the Commission's impairment determinations for DS1 loops and transport. As the basis for its appeal, CompTel and other appellants have argued, *inter alia*, that the Commission improperly interpreted recent judicial construction of the statutory impairment standard

[1] 47 U.S.C. § 160(c).
[2] *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4,2005) (TRRO).

as requiring a wire center-based loop test, and improperly constructed an interoffice transport test that results in findings of nonimpairment where requesting carriers have no alternatives to unbundled incumbent facilities. Although CompTel strongly supports the instant forbearance petition, and urges the Commission to quickly adopt the relief requested therein, CompTel's support for this petition should not be construed as an endorsement of either the loop or transport tests adopted by the Commission in the TRRO.

In its forbearance petition, the CLEC Coalition asks the Commission to forbear from application of 47 C.F.R. § 51.319(a)(4) to DS1 loops used to serve "predominantly residential" and "small office" buildings. In the TRRO, the Commission found that requesting carriers are not impaired as to DS1 loops in any wire center that has at least 60,000 business access lines and four or more fiber-based collocators.[3] Such a wire center-based loop test eliminates unbundling based solely on the particular characteristics of a central office, and does not take account of the specific characteristics of buildings served by that wire center.[4] Thus, every customer location served out of a wire center – from a large office building to a small apartment – would be denied access to competitive alternatives if that wire center fails to meet the Commission's loop impairment threshold.

As CompTel argued to the Commission in the Triennial Review Remand proceeding, a wire center-based test for loops fails to take account of the diverse customer base served from a central office. The wire center serving the FCC headquarters building in Washington, D.C, for example, also serves a local fish market,

[3] 47 C.F.R. § 51.319(a)(4); TRRO at ¶¶ 170-73.
[4] Which is not surprising: the Commission made little secret of the fact it was adopting a loop impairment test proposed by the Bell companies. *See* TRRO at ¶ 155 ("Consistent with the position of several incumbent LECs, including Verizon and SBC, we find that the area served by a wire center is the appropriate geographic market.").

condominiums and single family homes, and hundreds of residential and small business customers. Because of its failure to analyze each specific premises served by a local loop to determine whether CLEC overbuilding is economically feasible, a wire-based loop impairment test results in substantial false findings of non-impairment. Even the Commission recognized that "a properly designed building-specific test could assess variations in impairment far more subtly than could a wire center or MSA-based approach."[5] Nevertheless, the Commission rejected the proposed building impairment test because of concerns about "administrability" and the asserted belief that the D.C. Circuit's *USTA II* decision compelled a wire center-based test.[6]

As to administrability, the Commission concluded that it would be "impracticable and unadministrable" to adopt a building-specific impairment test because the D.C. Circuit decision in *USTA II* included a "prohibition on subdelegation to the states."[7] But the court never forbade the use of state commissions as fact finders if necessary, nor did the court bar the Commission from consulting with the states to gather facts on its own. The Commission had no experience with implementation of a building-specific impairment test because it had never imposed one – it is therefore impossible to credit the Commission's rejection of an effective impairment test based on administrability concerns. Although the Commission believed that its wire center test would capture all buildings subject to competitive loop supply, the Commission did not explain (and indeed could not) why every building served from a particular wire center would have the same economic characteristics. Because the Commission's stated goal was to eliminate

[5] TRRO at ¶ 155. The Commission specifically concluded that the wire center-based loop test "may in some cases be under-inclusive (denying unbundling in specific buildings where competitive entry is not in fact economic)." *Id.*
[6] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (USTA II).
[7] TRRO at ¶ 157.

unbundling only to those premises where alternative loop deployment would be economically viable – which the Commission held elsewhere excluded residential and small business premises[8] – the CLEC Coalition forbearance relief must be granted in order to ensure that such premises are not improperly denied access to competitive alternative providers.

As to *USTA II*, the Commission also vastly overstates the import of the court's admonition to incorporate a "potential competition" test into the Commission's impairment analysis.[9] What the court required was an impairment analysis of the particular characteristics of a facility that may render it capable of economic duplication, coupled with an analysis of whether adjacent facilities in the market share the same economic characteristics. Rather than conduct that kind of rigorous analysis, the Commission simply grouped all facilities in a single wire center into the same basket of analysis, ignoring clear differences between loops in the same wire center that would eliminate the possibility of competitive replication.

For example, the Commission ignored entry barriers associated with building access and other issues that can be low enough for the CLEC to serve one customer that demands very high-capacity connectivity, while these same types of entry barriers can prevent the same CLEC from serving a second customer in the same wire center that is otherwise indistinguishable from the first served customer. In addition, the Commission ignored the fact that different customers demand different levels of service, which in turn generate different revenue opportunities for the CLEC. All other things being equal, the

[8] *See, e.g.* TRRO at ¶ 43 ("We believe it is reasonable to expect that competitive LECs can most economically deploy dedicated transport facilities and high-capacity loops in those geographic markets where revenue opportunities are highest, which is confirmed by the evidence of actual deployment found in the record.").
[9] *USTA II*, 359 F.3d at 565-68, 573-74, 594.

comparison of construction costs with revenue opportunities leads CLECs to build in certain situations and forces them to lease ILEC capacity in other situations. It is therefore impossible to infer that competition is possible throughout the area served by a wire center for all types of loops based on the existence of competition for one or more customer locations connected to that wire center.

As the D.C. Circuit held, the Commission should only eliminate unbundling of transmission facilities where such facilities are subject to "multiple, competitive supply."[10] Because the Commission concluded that loop facilities to residential and small business customers are not subject to multiple competitive supply, the Commission should not deny loop unbundling to such customer premises.[11] The forbearance relief requested by the CLEC Coalition, if granted, will properly provide unbundled loop access to those customer premises where deployment of alternative loop facilities is not economically practical.

Second, the CLEC Coalition asks the Commission to forbear from applying the DS1-level interoffice transport capacity limits on those transport circuits that are components of enhanced extended loops (EELs).[12] A DS1 EEL is a combination of a DS1 loop cross-connected in an ILEC wire center (in which the requesting carrier is not collocated) to a DS1 dedicated interoffice transport facility that terminates either in a requesting carrier's own collocation space in an ILEC central office, or that carrier's switch in another location. As the Commission previously concluded, EELs promote

[10] See *USTA I*, 290 F.3d at 427.
[11] *See TRRO* at ¶ 168 ("Thus, our test captures areas characterized by high revenue opportunities and the likely presence of multiple competitive fiber rings.")
[12] 47 C.F.R. § 51.319(e)(2)(ii)(B).

facilities-based competition and innovation.[13] EELs enable CLECs to extend their geographic footprint and provide competitive service to small business customers who may be located outside of the city centers or areas of business concentration.

The EEL rules are an essential component of the Commission's efforts to facilitate the deployment of CLEC equipment and facilities. As a practical matter, wherever loops and transport are available as UNEs, the Commission's EEL rules simply require ILECs to provide the two in combination with one another. As such, the Commission concluded that, wherever DS1 loops and transport are available (in other words, where a central office meets the Commission's impairment thresholds for DS1 loops and transport), DS1 EELs are available as well. The Commission created some confusion, however, related to the interplay between its DS1 transport cap and EELs.[14]

For impairment purposes, the DS1 transport component of a DS1 EEL shares the characteristics of a DS1 loop in that the revenue opportunity available to overcome entry barriers for the self-deployment of a DS1 EEL is the same as for a DS1 loop. This is because the DS1 interoffice component of a DS1 EEL, unlike stand-alone transport, is not used to aggregate traffic from a number of end users.[15] Rather, the DS1 transport leg of the EEL carries the traffic of a single, small business end user served by the DS1 loop component of the EEL. The revenue generated from the single customer served by the EEL must cover the full cost of both the loop and transport component of the EEL.

[13] See Triennial Review Order at ¶ 364.
[14] *See* 47 C.F.R. § 51.319(e)(ii)(B); TRRO at ¶ 128 (limiting requesting carriers to 10 DS1 transport circuits on a particular interoffice route).
[15] *See* TRRO at ¶ 71 ("Furthermore, the revenues generated by dedicated transport do not depend on maintaining a single customer, or even several customers, but rather on maintaining a certain level of traffic on a route.").

As the Commission recognized with respect to DS1 loops, potential revenue opportunity is insufficient to recover the sunk cost of constructing a DS1 loop. The same conclusion applies to both the loop and transport components of DS1 EELs. The revenue opportunity available from a DS1 EEL is simply insufficient to overcome entry barriers associated with the costs of construction.[16] Nor is it feasible to replace the ILEC DS1 transport component of the EEL with third-party provided DS1 transport. If a central office does not meet the DS1 transport impairment thresholds, it is because, in the Commission's view, there are not sufficient competitive alternatives to DS1 transport. Thus, alternative transport at the DS1 level is not available – and cannot be available for any number of EELs in that central office, because each DS1 EEL serves a single customer and cannot be aggregated.

The Commission's ten line limit on DS1 transport, if construed as applicable to EELs, would contradict the Commission's clear findings regarding EEL impairment. Impairment is evidenced not only by the general lack of DS1 wholesale transport, but also, as the Commission concluded, by the significant economic and operational barriers to utilizing third party transport providers at the DS1 level, especially when used to transport the traffic of only a single end user as part of EEL-type arrangement.[17] Existing EEL loops subject to the 10 line transport cap will have to be disconnected and a new loop ordered to be cross-connected directly to a third-party transport provider, if such a third party provider even exists (which, pursuant to the Commission's impairment analysis of an office in which DS1 transport was unbundled, would not be the case). Such a requirement would completely defeat the entire economic rationale underlying the

[16] *See TRRO* at ¶ 370.
[17] *Cf.* TRRO at ¶ 128 (concluding that the 10 line limit on DS1 transport "is consistent with the pricing efficiencies of aggregating traffic.").

Commission's decision to preserve EEL availability. In short, the Commission is ensuring that CLECs can provide only 10 EELs per central office, notwithstanding the fact that the central office met both the DS1 loop and transport impairment tests.

Third, the CLEC Coalition asks the Commission to forbear from UNE eligibility criteria that may apply to EELs.[18] The purpose of the eligibility criteria adopted in the Triennial Review Order was to ensure that carriers only used EELs to provide "qualifying services."[19] The DC Circuit vacated the Commission's qualifying services test, but did not vacate the Commission's eligibility criteria.[20] Because the Commission, on remand, determined that carriers cannot purchase UNEs solely for the provision of stand-alone long distance service and wireless service, the EEL eligibility criteria – designed by the Commission to prevent the use of UNEs for these two services – are now moot.[21] Use of UNEs in violation of the Commission's new rules could justify the filing of a 208 complaint, just as any other violation of the Commission's rules. There is no reason for the Commission to maintain what is, in essence, a self-help process by which incumbents can unilaterally police UNE orders and impose the costs and burdens of audits on carriers. Eligibility criteria have created confusion and imposed unnecessary burdens on the industry, and perhaps more importantly, they deter the provision of innovative new services via EELs. If an ILEC has a good faith basis to believe a carrier is violating a Commission rule by using UNEs for services for which the Commission has found no impairment, the carrier may file a complaint with the Commission and seek appropriate damages.

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[18] 47 C.F.R. § 51.318.
[19] *See TRO* at ¶ 591.
[20] *USTA II,* 359 F.3d at 592-3.
[21] *See TRRO* at ¶ 34 ("[W]e deny access to UNEs for the exclusive provision of mobile wireless services and long distance services.").

For the foregoing reasons, the forbearance relief requested by the CLEC Coalition should be granted.

Respectfully submitted,

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